



Center for Alternative  
Dispute Resolution

Promoting  
alternative  
dispute  
resolution to  
advance  
national  
transportation  
goals

Summer 2006



# DOT ADR UPDATE

## Talk About It

*The purpose of this feature is to help DOT employees better understand the types of workplace issues that are mediated and how mediation may help employees resolve conflicts that cause them to feel angry, hurt, or frustrated and that hinder their job performance, even when an agreement isn't signed.*

George had worked as a scientist who managed a division of scientists at his federal agency for five years. Prior to that, he had worked for a private firm doing similar research and had been in the industry for 18 years. Since there were a limited amount of people doing this type of research, George was fairly well known among his peers.

George was happy at his federal job for the first four and a half years. During the fifth year, however, George's supervisor left and a Nancy became his new boss. Nancy was new to the agency. She was told upon taking the job that the office needed some "inspiration" and that is exactly what she planned to give it. Eager to make a good impression on her new bosses, Nancy came in like a lion. She immediately met with all staff and told them about the way she liked things done. She held meetings where she asked people substantive questions in front of the whole office and expected quick, detailed answers, instituted a more formal dress code and met with each division manager to assess what they had accomplished over the last year. She also asked for an organizational chart so she could determine how the office should be organized.

After a brief review of the organization, Nancy decided that it should be reorganized. Among other changes, Nancy merged George's division with a larger one managed by a more senior manager.

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## Talk About It, Cont.

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George accepted these changes but became more and more withdrawn at work. Nancy noticed that George barely participated at office meetings and seemed to refuse to make eye contact with her or even answer her when she spoke to him directly. She viewed George as someone who was resistant to change and as an impediment to her ability to revamp the office

Approximately two months after beginning her job, Nancy attended an industry conference and met Helen, who was well respected amongst Nancy's peers. When Helen realized who Nancy was, she immediately asked her about George. She explained that since George was so well respected many people were quite surprised to learn that he had been demoted. Nancy explained that she hadn't really viewed her changes as "demoting" George. Instead she had merely set up the office in a way that she believed made more sense organizationally. Helen said she understood, but that the word on the street was that George had been demoted.

Upon returning to the office Nancy was more aware of George. Clearly he was unhappy and did not like her. She wondered if he also viewed her changes as a demotion and decided to try to talk to him. When he resisted any discussion with her, she decided to request the help of a mediator. George agreed to attend the mediation.

**"When he resisted any discussion with her, she decided to request the help of a mediator."**

At the outset of mediation, Nancy explained that her goal upon joining this organization was to lead effectively in order to inspire people to work hard. She recognized that in order to inspire people, they needed to be comfortable and that clearly George, and possibly some others, were not. She said that she felt that George did not respect her authority and that he was always "pushing back" when she suggested new ideas.



George responded that he was not at all comfortable with Nancy. He explained that since she arrived, she never once asked for his opinion on anything but rather she came in and started barking out orders. He explained that when she reorganized the office he did feel like he was demoted and that he had received several phone calls from people in the industry asking him "what he did" to be removed from his job. He also explained that he was an introvert and needed time to think before he could answer some of Nancy's questions. He said that when she posed a complicated question about his approaches to his work in the hallway he wanted to respond but couldn't always provide a thoughtful answer immediately. All in all he said he felt devalued and disrespected and he believed that many others in the office did too.

Nancy thanked George for his honesty. She apologized for embarrassing him by reorganizing the office and explained that she did not mean to demote him but merely to reshape the office structure in a way she believed made more sense. She told him that she did value his expertise. She said that she viewed her strength as being a good leader, and admitted that she would probably never be seen as such an expert in this industry. She also agreed to make further changes, with George's input, that would place him in a position he was more comfortable with. She also agreed to allow George more time to think about things before demanding answers. She acknowledged that her style could be seen as somewhat authoritative but that all she really wanted was to inspire people to act. Finally, she asked for George's suggestions about how to be better received by the staff.

(Cont. on page 5)

# The Rise of Mediation

By Jennifer Glick\*

The last decade has marked a major shift in how people deal with conflict. While many still see the courtroom as the premier forum for bringing about a dispute, a growing number are turning to mediation as a reasonable alternative in dispute resolution. With only approximately 2%-3% of all lawsuits filed actually going to trial<sup>1</sup>, you are probably better served by heading down the resolution path instead of the litigation path in the first place.



Mediation offers a faster, easier, cheaper alternative to litigation where you are able to agree to your own, custom made, creative solutions which might not otherwise be available to you in court. Further, you have nothing to lose in attempting mediation because no legal rights are lost in the process and, if the matter does not settle, you are free to pursue more traditional mechanisms. Perhaps this is why the demand for mediation is rapidly growing.

Public perception of lawyers and how the law works has driven this rise in the desire for mediation. People are looking for a new way to deal with conflict and are clinging to the notion of viewing it as a positive challenge rather than something to be overcome by litigation. Public pressure for a legal system that is more readily accessible and affordable has also led to an increase in demand for mediation. While the number of cases that go to mediation each year is unknown, it is estimated to be in the millions. The most common cases for mediators deal with employment issues and family law, but mediation has recently begun to be used in a number of unique areas. Mediation is being used to resolve insurance claims filed by hurricane Katrina victims. Cases dealing with construction and real estate are also going to mediation more frequently. Mediation is even beginning to be used in the criminal setting to bring victims and offenders together to decide on reparations.

**“With only approximately 2%-3% of all lawsuits filed actually going to trial<sup>1</sup>, you are probably better served by heading down the resolution path instead of the litigation path in the first place.”**

The availability of education on mediation and other forms of Alternative Dispute Resolution in law school has also had a lot to do with the increase in its use. Today, of the 184 American Bar Association accredited law schools, each school offers at least one course in alternative dispute resolution while a vast majority offer more specialized mediation courses in addition<sup>2</sup>. This is a drastic change from a decade ago when courses on ADR were virtually non-existent.

With the use of mediation on the rise, its importance can not be ignored or discounted. When facing conflict, you should seriously consider immediately getting on board with the mediation process sooner rather than later and considering methods of ADR over risky litigation.

\* Jennifer Glick is a third year law student at California Western in San Diego and a summer intern at the Department of Transportation, Center for Alternative Dispute Resolution

<sup>1</sup> National Arbitration Forum, *Mediation Use has Grown Dramatically*. Sep. 2, 2005. Available at <http://arbitration-forum.blogspot.com/2005/09/mediation-use-has-grown-dramatically.html> (Last visited June 29, 2006).

<sup>2</sup> American Bar Association Directory of Law School Dispute Resolution Courses and Programs. 2003. Available at <http://www.law.uoregon.edu/aba/about.php> (Last visited June 29, 2006).

# Mediation Styles

By Jennifer Glick

One of the most widely debated topics in the mediation field today is the question of mediation style. Mediation is uniformly known as a process in which a trained neutral third party assists in resolving a dispute, or at least narrowing and clarifying issues, in a manner that is acceptable to both sides. The mediator helps to move parties from positions to focusing on their underlying interests. There are 3 main styles that exist in common use today. They are: facilitative, evaluative and transformative.

**“Mediation is a process in which a trained neutral third party assists in resolving a dispute, or at least narrowing and clarifying issues, in a manner that is acceptable to both sides.”**



Facilitative mediation is based on the belief that, with neutral assistance, people can work through and resolve their own conflicts. In a facilitative mediation, the mediator will take an active role in controlling the process and setting the ground rules for how the problem will be solved. The mediator asks questions to identify the interests of the parties in order to get to the real issues in the disagreement. The mediator helps the parties explore solutions that benefit both parties (sometimes called "win/win" solutions). In a facilitative mediation, the mediator does not offer an opinion on the strengths and weaknesses of the parties' cases, and works with the parties to come to a solution on their own.

In Evaluative mediation, the mediator uses his or her expertise of the issues in conflict to help the parties assess the strengths and weaknesses of their legal or other positions and works with them to achieve a settlement. The mediator controls the process and suggests solutions for resolving the conflict. The focus of an evaluative mediation is primarily upon settlement and the mediators make their best effort to get the parties to compromise, if necessary, and achieve a result.

Transformative mediation is based on the belief that conflict tends to make parties feel weak and self-absorbed. Transformative mediators try to change the nature of the parties' conflict interaction by helping them appreciate each others viewpoints and strengthening their ability to handle conflict in a productive manner. The mediator will intervene in the conversation between the parties in order to call attention to these moments of recognition and empowerment. Ground rules for the mediation are set only if the parties set them; and the mediator does not direct the parties to topics or issues. Instead, the mediator follows the parties' conversation and assists them in talking about what they believe to be important.

Each of these mediation styles have their appropriate place and use in mediation, and the use of any style depends on the positions, perceptions, needs and feelings of the disputants. In many instances a combination of the styles above may be appropriate or the mediator may use his or her own personal style. The bottom line is that there is room in the mediation practice for many styles, including those above and more.

# Federal Court ADR in Action: NHTSA Asked to Consider Mediation

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By Jennifer Glick

The Alternative Dispute Resolution Act of 1998 mandates all federal courts to devise and implement their own alternative resolution program and to encourage and promote the use of alternative dispute resolution in their jurisdiction. In response to this mandate, the 9<sup>th</sup> Circuit Court of Appeals in California has created an Alternative Dispute Resolution Program where parties are provided access to the dispute resolution process that best serves their needs to reduce the financial and emotional burdens of litigation, and to enhance the court's ability to timely provide traditional litigation services. Through the 9<sup>th</sup> Circuit's ADR Model Local Rule, the court authorizes and regulates the use of court-sponsored mediation, early neutral evaluation, consensual mini-trial, arbitration under 28 USC § 654, et seq., and/or other appropriate ADR process.

Currently, ten states, including California and New York, have filed suit in the 9<sup>th</sup> Circuit Court of Appeals, to force the National Highway Traffic Safety Administration (NHTSA) to toughen mileage regulations for sport utility vehicles and other light trucks. The suit contends that NHTSA did not do a rigorous enough analysis of the environmental benefits of its fuel economy regulations, as required by law, before issuing these new rules in March, 2006, for SUV's, minivans and pickup trucks. The case was referred to mediation as a part of the 9<sup>th</sup> Circuit's ADR program which mandates the use of ADR in civil cases through ordering case evaluation.

Through this court process, parties are required to consider whether they might benefit from participating in some ADR process, which type of ADR process, if any, is best suited to the specific circumstances in their case, and when the ADR session, if any, should be held and report this information in their case management statement.



The 9<sup>th</sup> Circuit ADR program is merely one example of how each federal court is carrying out its obligation to provide court sponsored dispute resolution. Other federal courts have implemented various mandatory types of ADR for certain cases, while others are working on revising, updating and re-examining their programs. Overall, a vast majority of lawyers and clients who have participated in an ADR program sponsored by a federal court, whether successful or not, have emerged grateful for the experience.

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## **Talk About It** (Continued from page 2)

George thanked Nancy for valuing him enough to take the time to discuss things with him. He admitted, however, that building trust between the two of them would take time but that he was committed to making it work.

They both agreed to meet again with the mediator one month later to assess their progress and discuss other ways to work together better in spite of their different styles.



# ADR Around the Federal Government

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## Court Expands ADR to Include “Rock, Paper, Scissors”

(*Avista Management, Inc. v. Wausau Underwriters Ins. Co.*, Case No. 6:05-cv-1430-Orl-31JGG)

A U.S. District Court in Florida denied a motion to designate the location for a deposition and instead ordered the parties to engage in “a new form of alternative dispute resolution.” Counsel and one paralegal for each side are to meet at a specified time on the courthouse steps (or other location, if one can be agreed upon) and engage in one game of “rock, paper, scissors,” with the winner selecting the deposition location. But, given the litigiousness of the parties, the court went ahead and set a date for hearing any appeals resulting from the outcome of the game.



## Alternative Dispute Resolution Program Resolves Cases

Recently, the Federal Election Commission (FEC) made available two cases resolved in its Alternative Dispute Resolution program. The program was established in 2000 to expedite resolution of some enforcement matters, reduce the cost of processing complaints, and enhance overall FEC enforcement. For a case to be considered for ADR treatment, a respondent must express willingness to engage in the ADR process, agree to set aside the statute of limitations while the case is pending in the ADR office, and agree to participate in bilateral negotiations, and, if necessary, mediation. Cases may include allegations of failure to register and report, exceeding the annual contribution limit, failure to provide contribution information, and other matters which constitute violations of the Federal Election Campaign Act. The two settlements reached in these cases bring the total number of cases resolved since the ADR program began to 249.



## DOD Pilot Programs Use Early Mediation and Facilitation in EEO Complaints

(<http://www.gao.gov/htext/d06538.html>)

As mandated by Congress, the Department of Defense (DOD) has undertaken a three-year pilot program seeking to enhance processes for resolving equal employment opportunity (EEO) complaints by civilian employees. Delays in addressing EEO complaints at federal agencies have been a long-standing concern. DOD has begun three pilot programs which emphasize early use of mediation and facilitation techniques to resolve allegations before they become formal complaints. In early May, the U.S. Government Accountability Office (GAO) issued a report on the first year of the pilot programs, describing their features and status and suggesting enhancements to DOD’s evaluation plan.



## Department of the Interior and Kerr-McGee Corp. to Mediation Dispute Over Royalties

Kerr-McGee Corp. will enter mediation with the U.S. Department of the Interior to settle a dispute over certain Gulf of Mexico royalty payments. The debate relates to the Deep Water Royalty Relief Act of 1995, which was designed to encourage oil and natural gas production. Kerr-McGee claims the law allowed producers to avoid paying royalties on production from certain parts of the Gulf of Mexico leased between 1995 and 2000. As a result of the mediation plans, the Oklahoma City energy company has halted its lawsuit against the Department of the Interior’s Minerals Management Service.

# ADR Use in the Transportation Industry

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## Mediation Board Enters Northwest Dispute

The National Mediation Board has stepped into the dispute between Northwest Airlines and its flight attendants on a new contract which the carrier said was essential for its survival. The board has a federal mandate to mediate in protracted disputes, but its initial role would be to determine the legality of any industrial action by flight attendants if they failed to reach a deal with management. The two sides stepped back from the brink when they agreed to hold fresh talks in the wake of the overwhelming rejection by cabin crew of the tentative deal reached in March. The court has approved new contracts agreed by pilots and most other staff, but these hinge on a resolution of the dispute with flight attendants.



## Mediator Says Deal Reached in Denver Transit Strike

After nearly 1,750 bus drivers, light rail operators and mechanics walked off the job in Denver's first transit strike in 24 years, union and transportation agency representatives sat down with a federal mediator to try and resolve the stalemate. The talks were informal, and no formal negotiations between the two sides were immediately scheduled. Over several weeks and with the involvement of the federal mediator, the city's mass transit agency and its largest employee union reached a contract agreement that settled the strike, the federal mediator said. Instead of the first offer of a 15-cent-an-hour raise the first year, the workers will receive 50 cents an hour more up front. After three years they will have received a \$1.80-per-hour raise. In other areas the contract has not significantly changed.

## Delta Pilots Reach Tentative Agreement in Arbitration

Delta Airlines and its pilots, represented by the Air Line Pilots Association, announced they had reached a tentative agreement in their heated dispute over the pilots' current contract. Delta, which is in bankruptcy, had asked an arbitration panel to throw out the contract so that it could compete more effectively in the brutal airline industry. The pilots had threatened to strike if their contract was thrown out unilaterally. No details of the compromise settlement were released. The company and the pilots' union said they would not release the specifics until union members and the union's governing board, the Master Executive Council, had voted on the proposed deal.

# Training Opportunities

The Department of Transportation Center for Alternative Dispute Resolution, in partnership with the Department of Health and Human Services Office of Dispute Resolution Specialist, offers a variety of courses. For a detailed description of the courses, visit our website at <http://www.dot.gov/ost/ogc/CADR>. The following courses are currently scheduled:

## **Conflict Management Workshop for DOT Executives and Key Management Officials**

- The first class in a series of conflict management workshops designed to provide DOT Senior Executives and other management officials with an overview of mediation theory and process.
- Wednesday, July 26, 2006; 9:30a.m. – 12:00p.m.
- To register, contact Diane Watkins at [diane.watkins@dot.gov](mailto:diane.watkins@dot.gov)

## **Conflict Management Skills for Managers**

- This two-day course focuses on managing workplace conflict and provides managers with approaches for transforming difficult circumstances into satisfying, mutually beneficial experiences using lectures, videos, simulations and participatory role play exercises.
- Tuesday – Wednesday, September 19-20, 2006; 8:30a.m. to 4:00p.m.
- To register, email [CADR@dot.gov](mailto:CADR@dot.gov) or call 202-385-CADR (2237)



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## Closing Thoughts

“I was fortunate in my public-service career to participate in addressing some of the most complex domestic and global issues affecting trade and transportation...In our successes, I found that effective, straightforward communications played a key part.”

- Norman Y. Mineta



U.S. Department of  
Transportation

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Dispute Resolution Council

## DOT ADR UPDATE

**DOT ADR Update** is published quarterly by the Department's Dispute Resolution Council in coordination with the Center for Alternative Dispute Resolution to eliminate barriers to ADR use by providing information about ADR and making ADR opportunities and resources available to everyone. If you have used ADR and would like to share your thoughts about the experience or have any comments or suggestions concerning **DOT ADR Update**, please contact CADR.



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